Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence

Grant H. Morris

REQUIRING SOUND JUDGMENTS OF UNSOUND MINDS: TORT LIABILITY AND THE LIMITS OF THERAPEUTIC JURISPRUDENCE

Grant H. Morris *

TABLE OF CONTENTS

"Insanity is a more difficult matter to deal with . . . ."[1]

I. INTRODUCTION

TORT liability is imposed on mentally disordered defendants as if they had no such disorder. If, for example, a person with a diagnosable disorder of paranoid schizophrenia[2] strikes another because of a delu-

* Professor of Law, University of San Diego School of Law; Clinical Professor, Department of Psychiatry, School of Medicine, University of California, San Diego. The author expresses sincere appreciation to Professor Daniel Shuman for reviewing an earlier draft of this article and providing helpful comments as well as clarification of his proposal.

1. O. W. HOLMES, JR., THE COMMON LAW 109 (1881).

2. Schizophrenia is a common, major mental disorder. According to the American Psychiatric Association, many large studies have reported a prevalence rate of 0.2% to 2.0%. Typically, the prevalence rate is reported to be between 0.5% and 1.0%. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 282 (4th ed. 1994). According to the 1990 census, the total population in the United States is 248,709,873. 1993 THE WORLD ALMANAC AND BOOK OF FACTS 387 (Mark S. Hoffman ed., 125th ed. 1992). A 1% prevalence rate for schizophrenia would be approximately 2,500,000 people.

Paranoid schizophrenia is a type of schizophrenia characterized by "the presence of promi-

sional belief that the other is about to attack, the mentally disordered person will be held liable for the tort of battery.[3] The court asks only whether the defendant acted with the purpose of making a harmful or offensive contact or with knowledge that such contact was substantially certain to result. The defendant's delusional belief that prompted the tortious action does not excuse tort liability. In essence, the defendant's misinterpretation of reality is treated as a nonexculpating mistake.

In a conventional mistake case, the defendant engages in conduct that injures the plaintiff, and the defendant intends to engage in that conduct and to produce that injury at the time the defendant acts. The defendant claims, however, to have acted under an erroneous, but reasonable, belief that circumstances existed justifying the defendant's behavior. In the absence of any other privilege, a good faith, reasonable mistake will not excuse tort liability.[4] Similarly, if a mentally disordered defendant acts with the intent required to impose tort liability on a nonmentally disordered defendant, the mentally disordered person's good faith, but unreasonable, mistake will not preclude tort liability.[5]

Liability of mentally disordered persons is not limited to intentional torts. If, for example, a mentally disordered motorist fails to control his or her car because of a delusional belief that God is directing the vehicle, the motorist will be held liable in negligence for damages that result.[6] The court asks only whether the defendant's conduct conformed to the standard of the reasonable, prudent person engaged in that activity—an objective standard that measures negligence for both mentally disordered and nonmentally disor-

---

nent delusions or auditory hallucinations in the context of a relative preservation of cognitive functioning and affect." AMERICAN PSYCHIATRIC ASS'N, *supra* at 287.

3. *See, e.g.*, McGuire v. Almy, 8 N.E.2d 760 (Mass. 1937). The defendant, characterized by the court as an insane person, struck the plaintiff, her nurse, with a piece of furniture. The jury found that the defendant acted with an intent to strike and injure the plaintiff. The defendant was held liable. The Supreme Judicial Court of Massachusetts summarized the rule as follows:

> [W]here an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that insofar as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.

Id. at 763.

4. *See, e.g.*, Ranson v. Kitner, 31 Ill. App. 241 (1888). The defendants, hunting for wolves, killed the plaintiff's dog believing it to be a wolf. They were held liable for the value of the dog, notwithstanding their good faith mistake.

5. If a tort requires a specific intent, however, a mentally disordered defendant who acts without such intent has not committed the tort and should not be, but sometimes has been, held liable. Deceit and malicious prosecution are examples of specific intent torts. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 135, at 1074 (5th ed. 1984). *See also* RESTATEMENT (SECOND) OF TORTS § 895J cmt. c (1979). Similarly, punitive damages should not be imposed on a mentally disordered defendant whose intentional tortious conduct was not accompanied by the malicious motive or outrageousness required to justify its imposition. KEETON, *supra* at 1074.

6. Breunig v. American Family Ins. Co., 173 N.W.2d 619 (Wis. 1970).

dered defendants.[7]

Throughout the twentieth century, law review commentators have overwhelmingly,[8] although not quite unanimously,[9] criticized the courts' refusal to consider a defendant's mental disorder in assessing tort liability. The articles are remarkably alike. A typical article begins by tracing the principle to *Weaver v. Ward*.[10] In this 1616 King's Bench decision, the court stated in its dictum[11] that "if a lunatic hurt a man, he shall be answerable in trespass . . . ."[12] The statement was not remarkable because, at the time, strict liability was imposed on all defendants who caused harm. The court used the lunatic example merely to distinguish tort law from criminal law which excuses mentally disordered defendants if they lack *mens rea*.

With the development of fault-based liability and societal acceptance of a medical model to explain mental disorder,[13] one would suspect that

---

7. *See, e.g.*, Johnson v. Lambotte, 363 P.2d 165, 166 (Colo. 1961) (The defendant, a patient being treated for chronic paranoid schizophrenia, left the hospital, drove a car, and collided with the plaintiff's car. The defendant was held liable for negligent operation of the automobile.); Shapiro v. Tchernowitz, 155 N.Y.S.2d 1011, 1016 (N.Y. Sup. Ct. 1956) (In discharging bullets from his gun, the defendant shot and killed the plaintiff's husband. In a wrongful death action, the defendant was held liable for negligence.); Ellis v. Fixico, 50 P.2d 162, 164 (Okla. 1935) (The plaintiff alleged that the defendant, a mentally disordered person, negligently allowed her car to be driven in a reckless manner by her driver, resulting in a collision and injuries to the plaintiff. The Supreme Court of Oklahoma held that a demurrer to the petition should not have been sustained. The court relied on a statute holding a person of unsound mind civilly liable for a wrong "in like manner as any other person."). *See infra* note 23 for cases decided since 1965.

8. Articles criticizing the imposition of fault-based tort liability on mentally disordered defendants include: Robert M. Ague, Jr., *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1956); Frances H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); W.G.H. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921); William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960); James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079; Wm. B. Hornblower, *Insanity and the Law of Negligence*, 5 COLUM. L. REV. 278 (1905); David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17 (1981); Wm. Justus Wilkinson, *Mental Incompetency as a Defense to Tort Liability*, 17 ROCKY MTN. L. REV. 38 (1944).

9. Two articles defend the imposition of fault-based tort liability on mentally disordered defendants. *See* George J. Alexander & Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967); Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983).

10. 80 Eng. Rep. 284 (K.B. 1616).

11. In *Weaver*, the plaintiff and the defendant were trained soldiers engaged in a military exercise. In discharging his musket, the defendant wounded the plaintiff. The defendant was held liable because the injury did not occur "utterly without his fault." *Id.* The defendant did not claim that he suffered from a mental disorder that should excuse his conduct.

12. *Id.*

13. Justice Michael Musmanno reported on the changing societal attitude toward mental disorder:

> Today modern science and society take a view of mental trouble quite different from that which prevailed down through the ages. In the ancient days victims of cerebral disorders were regarded as subhuman; they were assumed to be possessed of the devil and devoid of spirit, feeling, and the sensibilities of man; they were ostracized from community life. But time has opened the eyes of the sensible world and it is now recognized that a malady of the brain, so far as spirit and morals are concerned, is no different from a disease of the liver . . . .

Commonwealth *ex rel.* Edinger v. Edinger, 98 A.2d 172, 174 (Pa. 1953).

Weaver's "lunatic" dictum would be long forgotten. One's suspicions would be incorrect. *Weaver* has endured due to the court's recognition, also in dictum, that a defendant will not be liable for a purely accidental injury. *Weaver* is the earliest known case to suggest this limitation on strict liability.[14]

Commentators usually note that appellate cases upholding tort liability of mentally disordered defendants are few in number and infrequent in occurrence—especially cases involving negligence. For example, Cook,[15] writing in 1921, and Bohlen,[16] writing in 1924, could find only one case[17] holding a mentally disordered defendant liable for negligence. Curran,[18] writing in 1960, could find only one additional case—and that case was a trial court decision in the same jurisdiction as the first.[19]

This scant authority, however, influenced the American Law Institute in its Restatement of Torts. The first Restatement, published in 1934, contained a caveat in which the Institute expressed no opinion on whether mentally disordered persons are required to conform to the reasonable person standard.[20] The caveat was deleted in the 1948 supplement.[21] The second Restatement, published in 1965, specifically identified mentally disordered

14. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 6 (8th ed. 1988).

15. Cook, *supra* note 8, at 349.

16. Bohlen, *supra* note 8, at 23.

17. Williams v. Hays, 38 N.E. 449 (N.Y. 1894), *subsequent appeal*, 52 N.E. 589 (N.Y. 1899). A ship captain was in a state of exhaustion after working 48 hours to save the ship from a storm. In a dazed condition, he declined the assistance of tugboats offering to tow the disabled vessel. The ship was destroyed. Although the issues in the two appeals differed, in each the New York Court of Appeals recognized that mental disorder was not a defense to a claim of negligence. The New York Court of Appeals decisions in *Williams* are discussed at length in Bohlen, *supra* note 8, at 23-27. *Williams* is considered the leading American case holding that negligence liability of the mentally disordered is measured by the objective, reasonable person standard. Ague, *supra* note 8, at 215. The case was even cited as authority in the totally unrelated *Palsgraf* case. Palsgraf v. Long Island R.R., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

18. Curran, *supra* note 8, at 61.

19. Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446, 448 (N.Y. City Mun. Ct. 1934). (The defendant bus driver suddenly became insane, lost control of the bus, and collided with the plaintiff's parked truck. The defendant was held liable for negligence.).

20. RESTATEMENT OF TORTS § 283 (1934). The first Restatement's position is supported by Hornblower. Writing in 1905, Hornblower asserted that despite the New York Court of Appeals's decisions in *Williams*, the liability of a mentally disordered defendant for negligence remained an open question even in New York state. Hornblower, *supra* note 8, at 297. Other noted authorities predicted that courts would not impose tort liability on mentally disordered defendants. Ames, writing in 1908, prophesied that American courts "will sooner or later apply to the lunatic the ethical principle of no liability without fault." James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 100 (1908). Bohlen, writing in 1924, asserted that the decisions and opinions he discussed in his article "seem logically to imply that insanity is a bar to recovery." Bohlen, *supra* note 8, at 28. Dean Bohlen served as the Reporter for the first Restatement of Torts.

21. RESTATEMENT OF TORTS § 283 (Supp. 1948). The American Law Institute first considered the question of tort liability of mentally disordered persons at its 1929 annual meeting. The caveat was added at that time. Its deletion in 1948 can hardly be attributed to the one reported case decided between 1929 and 1948 imposing negligence liability on a mentally disordered defendant. Rather, the American Law Institute relied on opinions from several intentional tort cases that contained language broad enough to impose negligence liability in future cases. *Id.* at 654-58. "Once it is clearly seen that the insane person who intentionally injures another is subjected to tort liability despite his moral innocence . . . then these decisions

defendants as individuals who are subject to liability for conduct that does not conform to the reasonable person standard.[22] The American Law Institute's capitulation provided new authority to help settle a questionable rule.[23] Nevertheless, the continued dearth of negligence cases supporting the rule and the continued academic onslaught challenging the rule suggest that its future is uncertain.[24]

Commentators invariably list the courts' stated reasons for imposing the reasonable person test on the mentally disordered.[25] But the reasons are often presented as straw men who are unable to bear the weight of even the

---

become controlling authority for imposing liability for the same harm, unintentionally caused by one who is personally neither more nor less blameworthy." *Id.* at 658.

22. RESTATEMENT (SECOND) OF TORTS § 283B (1965); *see also id.* § 895J (1979) (stating that mentally disordered persons are not immune from tort liability solely because of their disorder).

23. Since 1965, five cases have followed § 283B by imposing negligence liability on mentally disordered defendants for conduct that did not conform to the reasonable person standard. Turner v. Caldwell, 421 A.2d 876, 876 (Conn. Super. Ct. 1980) (The defendant's claim that she was suddenly stricken by mental illness rendering her unable to control her vehicle was not a defense to an action grounded in negligence.); Jolley v. Powell, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974), *cert. denied*, 309 So. 2d 7 (Fla. 1975) (The defendant shot and killed the deceased but was acquitted of homicide by reason of insanity. In a wrongful death claim, the court construed the defendant's action as unintentional. The court held: "[W]hen the predicate for a wrongful death action is unintentional tort the standard against which such tort is measured is the objective, 'reasonable man standard' and the subjective state of mind of the tortfeasor is irrelevant."); Kuhn v. Zabotsky, 224 N.E.2d 137, 141 (Ohio 1967) (The defendant, claiming to have been suddenly stricken by a mental illness, drove his car into the rear of the plaintiff's car, inflicting personal injury and property damage. The court held the defendant liable for negligence.); Schumann v. Crofoot, 602 P.2d 298, 300 (Or. 1979) (An attorney who suffered from a psychotic disorder was held liable for professional negligence. The court specifically accepted the rule stated in § 283B.); Breunig v. American Family Ins. Co., 173 N.W.2d 619, 624 (Wis. 1970) (The court upheld a jury verdict against a mentally disordered defendant whose delusion affected her ability to operate her vehicle as a reasonable, prudent driver. In this case, evidence was sufficient to enable the jury to find that the defendant could anticipate the occurrence of incapacitating delusions. The court ruled, however, that if a situation arises in which the defendant is suddenly overcome without forewarning by a disabling mental disorder, liability will not be imposed.).

One post-1965 case specifically rejected the position that a mentally disordered person is liable for negligence. Fitzgerald v. Lawhorn, 294 A.2d 338 (Conn. C.P. 1972) (The defendant shot and wounded the plaintiff. The trial court judge found no intent to injure and treated the plaintiff's suit as a claim of negligence. The judge found for the defendant, characterizing the rule imposing tort liability on the mentally disordered as "an outdated point of view." *Id.* at 339. However, in apparent confusion, the court asserted: "The standard of conduct demanded of an insane person should not be any greater than the standard of conduct which it is reasonable for one to expect of a sane person. A sane individual is only required to exercise the standard of conduct which a reasonably prudent person would exercise under the same circumstances." *Id.*).

24. KEETON, *supra* note 5, at 1075 ("[T]he permanent direction of the law may be in doubt even now.").

25. The commentators' lists vary in number from three to six. Bohlen, for example, identifies three reasons for the rule: (1) the *Weaver* dictum, (2) a reappearance of liability without fault, and (3) liability for failure to perform a duty imposed on owners or occupiers of land or on persons engaged in certain trades. Bohlen, *supra* note 8, at 12. Ellis's list of six is the most comprehensive, although it includes reasons suggested by section 283B of the Restatement Second of Torts and by Prosser, as well as reasons articulated in court opinions. Ellis identifies the following reasons:

> 1) "[W]here one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it."
> 2) Liability for negligent acts will encourage those who are responsible for men-

most perfunctory analysis. To the claim that the rule is necessary to assure that innocent plaintiffs receive compensation from those who injure them, the answer has been that liability in negligence is not liability without fault.[26] For torts in which fault is a prerequisite to liability for nonmentally disordered persons, nothing less should be required for liability of the mentally disordered. To the contention that all people living in society, including mentally disordered people, should be held responsible for their torts, the refutation has been that tort liability is dependent upon a finding of tortious behavior. The question of whether a mentally disordered defendant has committed a tort cannot be answered by saying he or she is liable for all torts that he or she commits.[27] To the assertion that imposing liability on mentally disordered persons encourages guardians to control their activities or to obtain their involuntary confinement, the response has been that guardians who inadequately supervise persons under their authority are liable for their own negligence, and thus it is unnecessary to impose tort liability on the mentally disordered persons as well.[28] To the argument that mental disorder is easily feigned, and that the rule is needed to prevent nonmentally disordered defendants from succeeding with false claims, the rebuttal has been that the stigma and social consequences that accompany the label of mental

---

tally disabled persons (their families or guardians) to look after them and prevent them from doing harm.

3) If mentally disabled people are to live in liberty in society, they should pay for the damage they cause.

4) Mental disability is easily feigned, and defendants might choose such an act of duplicity to avoid liability.

5) It is difficult for courts to distinguish between "true" mental disability and variations in temperament, intellect, and emotional balance, and to allow all such differences to serve as excuses would erode the objective standard in all cases.

6) The insanity defense and the doctrine of diminished capacity have wreaked havoc in the field of criminal law, and this chaos should not be recreated in tort law.

Ellis, *supra* note 8, at 1083-84 (footnotes omitted).

26. Ague stated that this reason "is nothing more than strict (or absolute) liability dressed up in Sunday-go-to-meetin' garb. In the case of the lunatic let's not drift back into that unmoral abyss once again!" Ague, *supra* note 8, at 222. Seidelson noted that negligence law generally does not shift the loss from an innocent victim to a nonculpable, innocent actor. Seidelson, *supra* note 8, at 38.

27. The Second Restatement of Torts clearly separates the standard used to measure whether a mentally disordered person's conduct is negligent from the question of whether mental disorder immunizes a person from liability for conduct that is tortious. *Compare* RESTATEMENT (SECOND) OF TORTS § 283B (1965) *with* § 895J (1979).

28. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 50-51 (2d ed. 1980); Alexander & Szasz, *supra* note 9, at 35-36. Seidelson declared this reason to be "hardly more than a cynical fabrication to support a rule of law almost facially unfathomable." Seidelson, *supra* note 8, at 38.

Today, as a result of deinstitutionalization of mental patient populations from large state hospitals, most mentally disordered people live in the community. If they receive treatment for their disorders, treatment occurs in community programs. Even involuntary commitment is typically of short duration and occurs in local facilities. A policy that encourages guardians to seek involuntary commitment of mentally disordered persons in order to avoid tort liability is clearly outdated—if not out of touch with reality. *See* Splane, *supra* note 9, at 156-57 n.20 and 163 n.58.

disorder are a sufficient deterrent to its unwarranted use.[29] To the challenge that the objective standard would be jeopardized by attempts to distinguish mental disorder from nonqualifying peculiarities of temperament and character, the defense has been that abdication of judicial responsibility cannot be countenanced by a preference for easy resolution over proper resolution.[30] Admittedly, requiring an assessment of mental disorder increases the difficulty of decision making.[31] Nevertheless, confronting this difficulty is preferable to blindly imposing tort liability on mentally disordered persons who committed no torts.[32] The objective standard of care has already been abandoned for children,[33] when they are engaged in childhood activities, and for physically disabled individuals.[34] If fairness requires its abandonment for the mentally disordered, justice should not be thwarted by appeals to expediency.[35]

---

29. *See, e.g.*, Ellis, *supra* note 8, at 1087 (The label of mental illness carries a substantial stigma in our society. Although mentally incompetent people may escape contract obligations, false claims of mental incapacity are rare.); Seidelson, *supra* note 8, at 39 (Anyone willing to risk an adjudication of mental incompetence "in exchange for the possible evasion of liability in negligence would have to be crazy."). Seidelson also asserted that judges and juries are as competent to distinguish between a real and spurious defense of mental disorder as they are other defenses. *Id.* at 38.

Diagnostic agreement among psychiatrists and other mental health professionals has improved significantly with the use of specified criteria for each mental disorder contained in succeeding editions of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). DSM-III, published in 1980, was a marked improvement over previous editions, resulting in greater diagnostic inter-rater reliability. DSM-III-R was published in 1987 and DSM-IV was published in 1994. With each revision of the DSM, diagnosis tends to become more accurate and detection of false claims of mental disorder improves. *See* Ellis, *supra* note 8, at 1086-87.

30. Seidelson, *supra* note 8, at 40.

31. Prosser has often been credited with suggesting that courts have been reluctant to introduce into tort cases "the confusion and unsatisfactory tests attending proof of insanity in criminal cases." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1090 (1941). Succeeding editions of the Prosser treatise contain the same statement. *See, e.g.*, KEETON, *supra* note 5, at 1073. Prosser, however, cites Bohlen's 1924 law review article as the source of the idea. Bohlen, *supra* note 8, at 36 n.38. Although Bohlen presents the idea, he rejects it on the merits, declaring:

> [I]t seems unworthy of the law, whose purpose it should be to do justice and to perfect its machinery so that justice may be done, to deny immunity to persons so insane as to be incapable of culpability because of the difficulty of evolving a test satisfactory alike to lawyer and alienist [*i.e.*, psychiatrist] by which the precise degree of mental deficiency which precludes culpability may be determined.

Id.

32. Ague, *supra* note 8, at 224 ("[N]o rule governing [mental disorder] will be infallible; but certainly an imperfect rule is better than no rule at all in such a case. . . . Just because the criminal law rules on insanity fall far short of perfection is no reason why we should throw up our hands and say the same thing will happen in the tort field."); Seidelson, *supra* note 8, at 40 ("[T]he judicial refusal to define the 'insanity defense' [in tort cases] appears inconsistent with the conduct of courts in criminal cases and unjustified by the difficulty of the task.").

33. RESTATEMENT (SECOND) OF TORTS § 283A (1965). The objective standard, however, is applied to children engaged in dangerous activities that require adult qualifications. *Id.* cmt. c. The objective standard is applied, not to encourage children to exercise greater care when engaging in adult activities, but rather, to discourage them from engaging in adult activities in the first place.

34. *Id.* § 283C.

35. In other civil and criminal contexts, a person's mental disorder is considered in arriving at a just result. In the civil context, examples include guardianship, civil commitment, and

After rejecting the various reasons for the rule, commentators complete their typical articles by offering one of two solutions. Some commentators, especially those writing before 1960, would absolve mentally disordered persons from fault-based tort liability.[36] These writers narrowly define "mentally disordered persons" to include only those individuals who lack the capacity to appreciate the possible consequences of their behavior.[37] Because these individuals are unable to conform to the reasonable person standard, injuries caused by their conduct should be considered the result of unavoidable accidents.[38] Motorists who are suddenly and unexpectedly overcome with heart attacks, strokes, or fainting spells are not held liable for resulting injuries;[39] mentally disordered persons who are unable to control their conduct should be absolved as well.

Other commentators, especially those writing in the early 1980s, would measure fault-based tort liability of mentally disordered persons using a subjective standard of care.[40] Even these writers narrowly define "mentally disordered persons" to include only those individuals who are factually incapable of achieving the level of conduct required of the objective reasonable person.[41] Just as the law does not require the blind person to see, the

---

testamentary capacity; in the criminal context, examples include the insanity defense and diminished capacity. No overwhelming difficulty has been encountered in considering mental disorder in those contexts. No overwhelming difficulty is likely to be encountered if mental disorder is considered in determining tort liability. Ellis, *supra* note 8, at 1089-90.

36. *See, e.g.*, Ague, *supra* note 8, at 227 ("Can lunatics be said to be at fault simply because they are lunatics and 'know not what they do?' The question would seem to answer itself without further recourse to the scriptures."); Bohlen, *supra* note 8, at 28 ("[W]here the incapacity is mental, the same mental deficiency which prevents him from performing the duties normally incident to the relation or of conducting himself properly in the activity which he undertakes, would equally preclude his capacity for fault in entering the relation or undertaking the activity."); Cook, *supra* note 8, at 344 ("[W]here a lunatic is incapable of knowing what he is doing, *i.e.*, where he is not a responsible being at all, he would appear not to be liable: the result in such a case being that the person damaged through the act or omission of the lunatic would be in a position analogous to that of a person who has suffered damage through inevitable accident . . . ."); Hornblower, *supra* note 8, at 293 ("That a man should be responsible in damages for failing to do what he was physically or mentally unable to do, is certainly shocking to the common-sense of the average individual."); Wilkinson, *supra* note 8, at 57 ("If fault is the crux of negligence it is, indeed, hard to make a logical case for holding a mentally incompetent person liable for negligence, for where can fault be found?").

37. *See, e.g.*, Bohlen, *supra* note 8, at 9 ("Insane persons" defined as "incapable of forming a culpable intention, or whose incapacity to realize the probable consequences of their conduct makes it unjust to require them to conform to the standards of conduct legally required of . . . mentally normal persons."); Hornblower, *supra* note 8, at 283 ("When we come, however, to the question of a person *non compos mentis*, we have a situation of absolute mental incapacity . . . .").

38. In an unavoidable accident, even though the defendant's conduct injured the plaintiff, the result was not intended by the defendant, and the defendant was not negligent. The defendant is not liable. KEETON, *supra* note 5, at 162.

39. *Id.*

40. Ellis, *supra* note 8, at 1109 ("Adoption of a subjective standard . . . may be seen as a modest step toward equitable treatment of the mentally handicapped before the law."); Seidelson, *supra* note 8, at 44 ("Is it justifiable to frustrate legally a claimant's reasonable expectations by giving the benefit of a subjective standard to an incompetent who is the only potentially viable defendant? I think the answer is yes.").

41. Ellis, *supra* note 8, at 1108 ("[The subjective standard] does not immunize mentally disabled people from responsibility for their torts, but it does provide them with a defense when they can show that they did their best to avoid the accident and that further preventive

deaf person to hear, or the young child to act with the maturity and wisdom of an adult, a similar allowance should be made for those mentally disordered defendants who are incapable of conforming to the objective reasonable person standard.[42]

Recently, however, a new perspective has been introduced to the standard of care controversy. Daniel Shuman, filtering his ideas through the prism of therapeutic jurisprudence, has proposed expanding the subjective standard to include persons who have initiated treatment for their mental disorder or for the transient situational stress they are experiencing.[43] Shuman's proposal is original and provocative. Upon reflection, however, I believe that it is flawed and should be rejected. In Part II, I analyze Shuman's proposal.[44] In Part III, I suggest an alternative solution that I believe is preferable.

II. EXPANDING THE SUBJECTIVE STANDARD: A CRITIQUE

A. THE PROPOSAL

In a seminal book published in 1990, David Wexler used the term "therapeutic jurisprudence" to describe the study of law as a therapeutic agent.[45] Without subordinating other competing values, the therapeutic jurisprudence perspective seeks to enlighten legal decision making in order to enhance therapeutic consequences and diminish antitherapeutic consequences.[46]

Shuman asserts that in their desire to deter injury-producing conduct, fault-based tort law and therapeutic jurisprudence share a common agenda.[47] Tort law's therapeutic potential is advanced by encouraging individuals with mental or emotional problems to undergo effective treatment to ameliorate their conditions and reduce their accident-producing potential.[48]

---

measures were beyond their ability."); Seidelson, *supra* note 8, at 45 ("Under our definition of mental incompetence, the actor suffering from this infirmity cannot possibly act consistently with the reasonable person standard.").

42. For a comprehensive discussion analogizing mentally disordered persons to physically disabled persons and children, *see* Ellis, *supra* note 8, at 1098-106. Ellis asserts that although these analogies are "helpful tools," *id.* at 1106, "neither is perfectly apt." *Id.* at 1098. He concludes, nevertheless, that mentally disordered defendants should not be "held to a standard that they are definitionally incapable of meeting." *Id.* at 1108.

43. Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 426 (1992).

44. Perhaps "reanalyze" is a more apt word choice. At Professor Shuman's request, I previously critiqued his article while it was in draft stage. In the published article, he graciously acknowledged my "helpful comments" to that draft. *Id.* at 409; *see also, id.* at 428 n.95.

45. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990). A companion volume was published a year later. DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991).

46. WEXLER, *supra* note 45, at 3-20; WEXLER & WINICK, *supra* note 45, at x-xii, 17-38. Therapeutic jurisprudence principles have strongly influenced recent mental health law scholarship. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAVIORAL SCI. & L. 17 (1993) (discussing sources).

47. Shuman, *supra* note 43, at 410. Shuman expresses doubt, however, that tort law is capable of deterring injury-producing conduct. *See infra* notes 83-88 and accompanying text.

48. Shuman, *supra* note 43, at 411-12.

By threatening tort liability for unreasonable behavior, the objective reasonable person standard induces those in need of treatment to obtain it.[49] Thus, Shuman would continue to use that standard for those defendants who did not seek treatment prior to the injury-producing conduct. However, for those defendants who initiated treatment for their mental or emotional problem prior to the injury-producing conduct, Shuman proposes using a subjective standard of care that assesses the defendant's conduct in light of the treatment received.[50] Although use of a subjective standard will not always result in a lowered expectation for the defendant's behavior,[51] in some situations it will. For example, some therapies that are effective in the long term may actually increase the short term risk of accidental injury.[52] In determining whether a person under treatment performed as well as society could reasonably expect, society should be willing to consider the person's willingness to undergo treatment and the effects of that treatment on the person.[53] To maximize the therapeutic potential of tort law, Shuman would not limit his proposal to individuals suffering from major mental illnesses. Rather, he would also include the "walking wounded"[54]—identified as individuals whose life changes have produced transient situational stress.[55]

B. THE PROPOSAL UNDERVALUES THE COMPENSATION OBJECTIVE

In the first paragraph of his article, Shuman admits that therapeutic jurisprudence encourages a therapeutic outcome "when it is possible to do so without offending other important normative values."[56] Shuman acknowledges that tort law has two objectives: deterrence of potential injurers from engaging in unsafe conduct and compensation of injured victims.[57] But Shuman fails to consider the importance of the compensation goal to present-day tort law. Nineteenth century barriers to a plaintiff's tort recovery have been demolished by the actions of twentieth century courts:[58] A privity requirement for recovery against manufacturers of defective products has been

---

49. *Id.* at 424.

50. *Id.*

51. *Id.* at 428.

52. *Id.* at 423.

53. *Id.* at 428.

54. *Id.* at 414. Shuman notes that the "walking wounded" have been denominated by others as the "worried well." *Id.* n.36 (citing sources).

55. *Id.* at 416.

56. *Id.* at 409. Even Wexler, the father of therapeutic jurisprudence, admits that therapeutic considerations should not trump other, more important, normative values. *See, e.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993); David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 518 (1992). Therapeutic jurisprudence would restructure the law to better accomplish therapeutic goals only if, in a given context, other things (*i.e.*, normative values) were equal. Therapeutic jurisprudence does not resolve the question of whether those other things are equal. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, *supra* at 280; WEXLER & WINICK, *supra* note 45, at xi-xii.

57. Shuman, *supra* note 43, at 410.

58. Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 301 (1981).

abandoned;[59] charitable,[60] intra-family,[61] and governmental[62] immunities have been eliminated in whole or in part; a rule imposing no duty to avoid prenatal injuries has been renounced;[63] an impact requirement to recover for negligently inflicted mental injury has been repudiated;[64] rigid classification of trespassers and licensees to reduce or eliminate the duty owed by land occupiers has been rejected;[65] the doctrine of contributory negligence has been replaced with comparative negligence rules.[66] The goal of compensation also has been strengthened by the courts' acceptance of loss distribution principles.[67] In some areas, notably employee injuries,[68] minor automobile accidents,[69] and defective products,[70] fault-based liability has been supplanted by liability without fault, thus enabling injured plaintiffs to obtain compensation without even proving that defendants were blameworthy wrongdoers in need of deterrence.[71]

In determining whether a defendant's negligence should be measured by

59. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

60. *See, e.g.*, President of Georgetown College v. Hughes, 130 F.2d 810, 825 (D.C. Cir. 1942).

61. *See, e.g.*, Brown v. Brown, 89 A. 889, 891 (Conn. 1914) (abrogating intraspousal immunity); Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963) (abrogating parent-child immunity).

62. *See, e.g.*, Stone v. Arizona Highway Comm'n, 381 P.2d 107, 109 (Ariz. 1963) (abrogating the immunity of the state government); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957) (abrogating the immunity of municipal corporations).

63. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (recovery allowed to viable fetus who was born alive); Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) ("wrongful life" recovery permitted for the cost of extraordinary medical expenses incurred due to infant plaintiff's handicaps); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949) (upheld claim for wrongful death of viable fetus).

64. *See, e.g.*, Battalla v. State, 176 N.E.2d 729, 730 (N.Y. 1961).

65. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968).

66. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975).

67. *See* Ursin, *supra* note 58, at 301-03.

68. N.Y. WORK. COMP. LAW §§ 1 to 49-hh (McKinney 1993). In 1910, New York was the first state to enact a Workers' Compensation Law. 1910 N.Y. Laws 674 (designated as Article 14-A of the N.Y. Labor Law of 1909). One year later, the statute was declared unconstitutional. Ives v. South Buffalo Ry., 94 N.E. 431, 448 (N.Y. 1911). The New York legislature amended the state constitution to provide for a system of workers' compensation, N.Y. CONST. art. 1, § 18, and reenacted the Workers' Compensation Law in 1914. 1914 N.Y. Laws ch. 41. The reenacted law was held constitutional. Jensen v. Southern Pac. Co., 109 N.E. 600, 604 (N.Y. 1915). *See also* WIS. STAT. ANN. §§ 102.01-.89 (West Supp. 1993). Wisconsin was the second state to enact a Workers' Compensation Law. In 1911, the law, as originally enacted, was held constitutional. Borgnis v. Falk Co., 133 N.W. 209, 222 (Wis. 1911).

69. MASS. GEN. LAWS ANN. ch. 90, § 34M (West Supp. 1993). Massachusetts' no fault automobile statute, the nation's first, was held constitutional in Pinnick v. Cleary, 271 N.E.2d 592, 611 (Mass. 1971).

70. Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901 (Cal. 1963). Strict liability for manufacturing defects seems firmly established. However, definitional difficulties have been encountered in design defect and product warning cases. For those cases, recent proposals seek restoration of negligence as the basis of liability. *See, e.g.*, AMERICAN LAW INSTITUTE, 2 REPORTERS' STUDY ON ENTERPRISE LIABILITY FOR PERSONAL INJURY 16, 39, 81-82 (1991).

71. It should be noted, however, that tort liability accounts for only a small portion of the compensation received for injuries. A recent RAND study found that liability compensation is attempted for only one injury in ten. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110 (1991).

an objective or a subjective test, the compensation goal cannot be ignored. If a subjective standard of care is employed for persons with mental and emotional problems who are undergoing treatment, then injured innocent victims will be forced to absorb the costs of injuries produced by the increased risk of substandard behavior posed by those defendants. Such a result is antithetical to the compensation objective and to the twentieth century tort law developments that support this objective.[72]

Shuman concedes that his proposal, while encouraging treatment, denies compensation to innocent plaintiffs. He notes, however, that compensation is "a relativist rather than an absolute concern of tort law."[73] Fault-based tort law does not award compensation to an injured plaintiff unless the defendant has been found blameworthy. Thus, when a plaintiff is injured by a physically incapacitated defendant whose conduct is measured by a subjective standard that includes this incapacitation, the injured plaintiff may receive no compensation.[74]

Shuman's analogy is not convincing. Admittedly, a subjective standard is used to measure the conduct of a person who is blind, deaf, or otherwise seriously physically challenged.[75] To the extent possible, the law requires physically challenged individuals to undertake appropriate precautions in order to reduce the increased risk from their disability. For example, a blind person venturing out on the city streets may be expected to use a white cane or a seeing-eye dog. Nevertheless, even with this precaution, the blind person is simply unable to achieve the level of safety of a person with sight. Because the condition of blindness can be proven easily and because we are all aware of the effect of that condition on the person's ability to anticipate harm, society is willing to tolerate the increased risk by holding the blind person to the standard of the reasonable blind person.[76]

Although the subjective standard is applied both to physically challenged plaintiffs and defendants, in most cases involving physically challenged persons, the plaintiff was the physically challenged litigant.[77] The subjective standard may have been accepted originally by courts eager to avoid the harsh contributory negligence doctrine and accord physically challenged

72. *See, e.g.*, Goff v. Taylor, 708 S.W.2d 113, 115 (Ky. Ct. App. 1986):

> That the subjective standard would afford fairer treatment of a defendant afflicted with a mental disability cannot be disputed. The question the commentators do not attempt to reach is the fairness to the victim of the wrongful conduct. Is a victim any less entitled to compensation for his loss because of the mental deficiencies of his tortfeasor? We believe the answer is no and the tort law as it stands has long served to accommodate that principle.

73. Shuman, *supra* note 43, at 431.

74. *Id.*

75. RESTATEMENT (SECOND) OF TORTS § 283C (1965).

76. The Restatement commentary suggests that a subjective standard is used for physical disability but not for mental disability because of "the greater public familiarity with the former, and the comparative ease and certainty with which it can be proved." *Id.* cmt. b.

77. Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 21 (1951). Similarly, in most cases using a relaxed standard of care for children, the plaintiff was the child. *Id.* at 24.

plaintiffs an opportunity for recovery.[78]

Typically, however, the standard of care is not subjectified for a person who has a physical illness.[79] If, for example, I am suffering from influenza and drive my car, I am not held to the standard of the reasonable person with influenza. Even if I obtain treatment for my condition, for example, I ingest a medicine that causes drowsiness, and I fall asleep while driving, I am still held to the objective standard of the reasonable, prudent driver. Shuman's target population, which includes the walking wounded as well as those suffering from major mental illness, is more analogous to the physically ill for whom an objective standard is used, rather than the physically challenged for whom a subjective standard is used.[80]

Additionally, mentally disordered persons are far more likely to be involved in tort litigation as defendants than are physically challenged persons. For example, two-thirds of all tort claims for nonfatal personal injuries involve motor vehicle accidents.[81] Blind people do not drive automobiles,[82] but people with mental or emotional problems often do. Innocent plaintiffs

78. Some writers have urged adoption of an explicit double standard: Physically challenged people and children should be judged by the objective test when they are defendants and by the subjective test when they are plaintiffs. Using a relaxed standard for plaintiffs would enable them to avoid being found contributorily negligent and increase their opportunity to obtain full compensation for their injuries. Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786-89 (1950). Courts, however, did not adopt the double standard proposal even in jurisdictions that applied the doctrine of contributory negligence. *See, e.g.*, Faith v. Massengill, 121 S.E.2d 657, 660 (Ga. Ct. App. 1961) (expressly applying the same standard to determine a child's negligence and contributory negligence); John S. Irvin, Note, *Torts—Negligence—The Standard of Care for Children: A Possible Negligence-Contributory Negligence Double Standard*, 38 OR. L. REV. 268, 275 (1959) (asserting that the double standard proposal has not been supported by case law). With the widespread adoption of comparative negligence, the proposal is even less supportable. Contributorily negligent plaintiffs are able to recover for that portion of their injuries attributable to the defendants' negligence.

79. Although the language of § 283C applies a subjective standard of care to physical illness as well as to physical disability, every case cited as authority for the physical illness category involved heart attack, stroke, epileptic seizure, fainting spell or other loss of consciousness that was sudden, unforeseeable, and totally incapacitating. RESTATEMENT (SECOND) OF TORTS § 283C app. (1966). *See, e.g.*, Moore v. Capital Transit Co., 226 F.2d 57 (D.C. Cir. 1955) (convulsive seizure), *cert. denied*, 350 U.S. 966 (1956); Moore v. Presnell, 379 A.2d 1246 (Md. Ct. Spec. App. 1977) (sudden, unforeseeable loss of consciousness); Weldon Tool Co. v. Kelley, 76 N.E.2d 629 (Ohio Ct. App. 1947) (sudden heart pains); Keller v. Wonn, 87 S.E.2d 453 (W. Va. 1955) (massive cerebral hemorrhage). Arguably, these examples could be classified as unavoidable accidents.

80. After carefully analyzing the analogies of physically disabled persons and children to mentally disordered persons, one writer concluded: "[N]either of the analogies is so perfect that it is self-evident that manifest injustice is done when courts refuse to apply a subjective standard to mentally handicapped adults." Ellis, *supra* note 8, at 1106.

81. HENSLER, *supra* note 71, at 110.

82. Partially sighted and other physically challenged individuals may drive automobiles and engage in other activities that subject them to tort liability. Typically, however, the extent and permanence of their disability is known before they engage in the activity, and society may obligate them to undertake precautionary measures to minimize the increased risk. Requiring a physically challenged person to obtain a driver's license assures that with precautions in place, the person is capable of meeting minimally acceptable standards of driving. Children who drive automobiles or who engage in other adult activities are held to the objective standard of the reasonable adult. RESTATEMENT (SECOND) OF TORTS § 283A cmt. c (1965).

who have been subjected to an unreasonable risk of harm from the activities of mentally disordered defendants have a legitimate claim for compensation.

C. THE PROPOSAL'S DETERRENT EFFECT IS UNPROVEN AND UNNECESSARY

Tort law assumes that people are aware of potential tort sanctions and alter their behavior to avoid them.[83] Shuman admits, however, that tort law's ability to deter unsafe conduct is problematic.[84] Reporting on extensive research,[85] Shuman recently concluded that none of the mainstream psychiatric and psychological theories of human behavior[86] supports the deterrence theory of tort law.[87] Indeed, the claim of tort law's deterrent effect rests on society's intuitive belief that a person's behavior is influenced by potential tort liability.[88] Without empirical verification of the deterrence claim, however, courts should be reluctant to adopt a proposal that sacrifices the compensation objective.

Shuman asserts that if tort law does operate as an incentive for appropriate behavior, people with mental or emotional problems will not be encouraged to seek treatment if an objective standard of care is applied to them regardless of whether they initiate treatment prior to the injury-producing conduct.[89] Shuman favors the promise of a subjective standard as a necessary inducement for treatment. He presents an example of a defendant who initiates treatment, complies fully with the prescribed treatment regime but who experiences reduced concentration or responsiveness while driving because he or she is preoccupied with problems raised during psychotherapy.[90] In judging that person's tort liability, Shuman rejects use of an objective standard that gives the defendant no extra credit for a responsible decision to seek treatment.[91] From Shuman's perspective, a subjective standard should be used because successful treatment will ultimately reduce the risk of injury from defendants who have sought treatment.

Tort law, however, acts much more directly. If deterrence works, it works by imposing tort liability on defendants who engage in unsafe behavior. As applied to Shuman's driving example, the conduct that society wishes to encourage is safe driving, not treatment of a mental or emotional problem that

---

83. Shuman, *supra* note 43, at 411.

84. *Id.* at 410.

85. Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 KAN. L. REV. 115, 140-64 (1993).

86. Shuman grouped the mainstream theories into organic, biological, psychodynamic, behavioral, and cognitive schools. *Id.* at 140.

87. *Id.* at 167. Shuman noted that the deterrence goal of tort law could be achieved if the tort system were modified using the social learning theory model of human behavior. The modification would require that more meritorious claims of tortious behavior be brought to increase the likelihood that inappropriate behavior is perceived to be punished. Because of society's desire to reduce, not increase, civil litigation, Shuman opined that an attempt to conform the tort system to social learning theory is not likely to succeed. *Id.* at 165.

88. Shuman, *supra* note 43, at 411.

89. *Id.* at 424.

90. *Id.* at 420.

91. *Id.*

may result in safe driving in the uncertain future. If people are rational enough to seek treatment for their mental problems prior to engaging in dangerous activities, they should be rational enough not to engage in those activities if the treatment they receive exposes potential plaintiffs to unreasonable risks of harm through reduced concentration or responsiveness.

The subjective standard inducement may not even achieve the treatment goal. Just as most people do not calculate their potential tort liability before they act, most people with mental and emotional problems will not choose to obtain treatment relying on the knowledge that they will only be held to a subjective standard if they injure another person while undergoing treatment. People just don't act that way. They will seek treatment if they believe it will benefit them by reducing some disturbing symptoms such as depression or anxiety. That is why people seek treatment, not because of a promise of a relaxed standard of care that may reduce their tort liability.

D. THE PROPOSAL'S CONSEQUENCES ARE POTENTIALLY ANTITHERAPEUTIC

People who believe they are free and responsible for their actions behave differently from people who believe that they lack choice and responsibility.[92] According to attribution theory, people are less likely to strive for success when they attribute success or failure to outside forces that they are powerless to control.[93] If people are able to avoid tort liability by "blaming" their mental or emotional problems for their substandard conduct, they will behave less responsibly.[94] Thus, by requiring them to conform to the objective standard of conduct applicable to others, the law compels responsible behavior and refuses to reinforce feelings of learned helplessness.[95] In this way, the objective standard is therapeutically beneficial.

Shuman, however, rejects this argument for those individuals who have initiated treatment for their mental or emotional condition. He notes that a person's willingness to undergo treatment "is not merely a necessary but also a sufficient condition of efficacious treatment."[96] For this reason, Shuman asserts that a refusal to factor treatment efforts into the standard of care cannot be justified.[97]

Shuman's reasoning is not persuasive. Admittedly, no magic pill exists for the quick and effective treatment of mental problems. Treatment that may reduce the risk of injury in the long term may not reduce it, and may even

92. John Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719, 721-23 (1973) (discussing empirical research on human behavior).

93. Harold H. Kelley & John L. Michela, *Attribution Theory and Research*, 31 ANN. REV. PSYCHOL. 457, 480-89 (1980) (discussing consequences of attributions).

94. Similarly, by failing to assign personal responsibility for criminal conduct, successful insanity defenses may hinder treatment of insanity acquittees. To the extent acquittees believe their crimes were caused by their illnesses, they will be less inclined to undergo a treatment process designed to change their thoughts and actions. Robert A. Fein, *How the Insanity Acquittal Retards Treatment*, 8 LAW & HUM. BEHAV. 283, 291 (1984).

95. Shuman, *supra* note 43, at 421.

96. *Id.*

97. *Id.*

increase it, in the short term. But precisely because treatment is not immediately effective, a person with a mental or emotional problem should weigh the risks of engaging in dangerous activities while undergoing the treatment process. Using a subjective standard of care to enable a mentally disturbed defendant to avoid tort liability reinforces the message that a decision to seek treatment is all that society requires of the individual. In essence, reliance on the uncertainties of the treatment process replaces reliance on the mental or emotional condition itself as an excuse for irresponsible behavior. Helplessness is learned, but from a new source.

Additionally, one can question Shuman's assumption that effective treatment pursued to its logical conclusion will ultimately reduce the risk of injury. Some forms of effective treatment have antitherapeutic consequences that increase the potential for danger even while reducing or eliminating the patient's symptoms. For example, psychotropic medications are the treatment of choice for schizophrenic and affective disorders.[98] Many patients receive long-term treatment with these medications and experience impaired memory, reasoning ability, and learning capacity on a continuing basis.[99] Before rushing to embrace a state of therapeutic grace, these deleterious consequences must be fully considered—both by individuals in deciding whether to accept treatment, and by society in deciding whether to encourage treatment.

Use of a subjective standard has other antitherapeutic consequences for people with mental or emotional problems. By refusing to hold them accountable as ordinary persons, society denies their status as full-fledged human beings.[100] Their immunity from tort liability compels others to shun them, increasing their isolation.[101] Pressure to institutionalize them, or reinstitutionalize them, is inevitable.[102] In contrast, an objective standard is consistent with current mental health treatment policy that encourages voluntary treatment efforts in the community setting.[103]

---

98. *Id.* at 423.

99. Bruce J. Winick, *The Right to Refuse Psychotropic Medication: Current State of the Law and Beyond, in* THE RIGHT TO REFUSE ANTIPSYCHOTIC MEDICATION 7, 11 (David Rapoport & John Parry, eds., 1986).

The temporary and permanent adverse affects of medication have been proven in numerous studies and attested to by courts and commentators. *See, e.g.*, Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.* Mills v. Rogers, 457 U.S. 291 (1982); Rennie v. Klein, 462 F. Supp. 1131, 1137-38 (D.N.J. 1978); Riese v. St. Mary's Hosp., 271 Cal. Rptr. 199, 203-04 (Cal. Ct. App. 1987); Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 297-310 (1992) (discussing research on side effects).

100. Alexander & Szasz, *supra* note 9, at 35; Splane, *supra* note 9, at 167.

101. Alexander & Szasz, *supra* note 9, at 36.

102. *Id.* at 38. "If a person deemed civilly irresponsible is at large, surely he cannot be allowed to continue to commit torts without compensating his victims. A person enjoying the liberties of a sane citizen, but licensed at law to commit tortious acts with impunity, is unthinkable." *Id.*

The antitherapeutic effects of institutionalization include stigma, dependency, isolation, and degeneration. *See* Splane, *supra* note 9, at 161-62, for discussion and sources.

103. Splane, *supra* note 9, at 160-69. "The objective standard helps minimize the burden on the community from deinstitutionalization, helps foster community acceptance of the men-

Tort law attempts to strike a balance between a plaintiff's claim to protection against injury and a defendant's claim to freedom of action.[104] Thus, in considering whether a subjective standard is therapeutic or antitherapeutic, its effects on the plaintiff must be considered as well as its effects on the defendant. Specifically, does a court judgment imposing tort liability on the defendant have a beneficial restorative effect on the plaintiff? In a recent article, Shuman examined behavioral research on this issue and concluded that it did.[105] In fact, victims are most satisfied when they receive compensation from the person who injured them rather than from a third party.[106] Shuman opined that "the psychological primacy of compensation may not be adequately addressed by sterile payments to an injured person from a third party lacking responsibility for causing the harm to the plaintiff."[107] Obviously, tort law's potential restorative effect is completely lost if, in a fault-based system, a mentally disturbed defendant is absolved from all responsibility. The injured plaintiff recovers from no one.

E. THE PROPOSAL IS OVERINCLUSIVE

If Shuman's subjective standard proposal were limited exclusively to those who suffer from major mental illnesses, the proposal would differ little from earlier proposals.[108] However, because any person's concentration and responsiveness may be profoundly impacted by the death of a loved one, the loss of a job, the experience of obtaining a legal education,[109] or other transient situational stress, Shuman expands the subjective standard shield to include the walking wounded as well.[110]

Such expansion is clearly unwarranted. Shuman cites research finding that 14% of the population, that is, thirty-five million Americans, suffer from a mental disorder.[111] More recent research, based on structured psychiatric interviews with 8,098 men and women who were selected to be representative of the entire population, revealed that 48% had experienced a mental disorder during their lifetimes, and that 29.5% had experienced a mental disorder within the twelve months preceding the interview.[112] Extra-

---

tally ill, and encourages the mentally ill to become self-sufficient, responsible members of the community." *Id.* at 163-64.

104. KEETON, *supra* note 5, at 6.

105. Daniel W. Shuman, The Psychology of Compensation in Tort Law 62 (January 10, 1994) (unpublished manuscript, on file with the author).

106. Andre deCarufel, *Victims' Satisfaction with Compensation: Effects of Initial Disadvantage and Third Party Intervention*, 11 J. APPLIED SOC. PSYCHOL. 445, 452 (1981).

107. Shuman, *supra* note 105, at 22.

108. *See supra* notes 40-41 and accompanying text.

109. Shuman, *supra* note 43, at 417 (discussing reports that 32% of students were depressed by the end of their first year of law school and that 40% were depressed by the third year).

110. *Id.* at 414-15.

111. *Id.* at 413 (discussing Laura A. Cushman et al., *Psychiatric Disorders and Motor Vehicle Accidents*, 67 PSYCHOL. REP. 483, 486-87 (1990)).

112. Ronald C. Kessler et al., *Lifetime and 12-Month Prevalence of* DSM-III-R *Psychiatric Disorders in the United States: Results from the National Comorbidity Survey*, 51 ARCH. GEN. PSYCHIATRY 8, 12 (1994). Data was gathered on the prevalence of 14 DSM-III-R psychiatric disorders. The most common were major depressive episode (17.1% lifetime, 10.3% within

polating these percentages to the entire population suggests that 120 million Americans experience a mental disorder during their lifetimes and that seventy-five million experience a mental disorder within any twelve-month period. Obviously, a proposal that may extend the subjective standard to persons experiencing a mental disorder, or even more broadly to persons under stress, has enormous implications for the determination of tort liability.

In the landmark case of *Vaughan v. Menlove*,[113] the court weighed the merits of the objective and subjective standards. Chief Justice Tindal explained that the subjective standard was rejected because liability determined by the good faith judgment of the defendant "would be as variable as the length of the foot of each individual."[114] In fact, because most defendants do make good faith judgments, one commentator even suggested that a subjective standard "would tend to produce nearly universal immunity from liability."[115] In contrast, by requiring the individual to conform to the objective, reasonable person standard, a community level of safety can be uniformly maintained.[116]

As previously discussed, the less demanding subjective standard has supplanted the objective standard for physically challenged individuals and children. The law recognizes that they are incapable of conforming to the objective standard and thus are not at fault when they fail to do so.[117] Can a similar dispensation be claimed by persons with mental or emotional problems? An affirmative response can only be given if their otherwise tortious behavior was caused by the mental condition and not by free choice.[118]

A finding that a defendant is mentally disordered does not, in and of itself, justify a further finding that the defendant's behavior was uncontrollably caused by the mental disorder, or even that the behavior was related to the mental disorder.[119] After reviewing clinical observations of mentally disordered people, empirical research comparing mentally disordered and non-

---

last 12 months), alcohol dependence (14.1% lifetime, 7.2% within last 12 months), social phobias (13.3% lifetime, 7.9% within last 12 months), and simple phobias (11.3% lifetime, 8.8% within last 12 months). *Id.* Of those persons with a history of at least one mental disorder, 56% had two or more. *Id.* at 17.

113. 132 Eng. Rep. 490 (C.P. 1837).

114. *Id.* at 493. Determining liability by considering whether the defendant acted honestly and to the best of his or her own judgment "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various." *Id.*

115. Seidelson, *supra* note 8, at 19.

116. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

117. *See supra* notes 33-34, 75-82 and accompanying text.

118. Seidelson asserted that a subjective standard is warranted only when a litigant's "subjective characteristic makes it uniquely difficult for the litigant to comply with the reasonable person standard, and if judicial cognizance of that characteristic does not frustrate the other litigant's reasonable expectations." Seidelson, *supra* note 8, at 20.

119. Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 581 (1978) [hereinafter Morse I]; *see also* Stephen J. Morse, *Treating Crazy People Less Specially*, 90 W. VA. L. REV. 353, 353 (1987) [hereinafter Morse II]: "[S]pecial legal treatment results from the assumption that crazy people are not responsible for their behavior, an assumption buttressed by the mistaken and usually unanalyzed notion that mental disorder per se deprives people of responsibility." *Id.*

mentally disordered people, and empirical research bearing directly on the rationality and normality of mentally disordered people,[120] Morse concluded that the behavioral differences between mentally disordered and non-mentally disordered people are less pronounced than is usually supposed.[121] In fact, considerable evidence suggests that mentally disordered people "are capable of behaving normally and rationally."[122] Especially relevant are studies of the behavior of mentally disordered people in real world contexts, such as driving cars, holding jobs, or managing finances. Mentally disordered people were found to be better able to perform these tasks than is usually assumed, "and their behavior is often indistinguishable from the behavior of normal people."[123] Morse found that, at most, mental disorder slightly predisposes a person to socially unacceptable behavior, but that such behavior is rarely, if ever, irresistible.[124]

In his article, Shuman acknowledges the questionable linkage between mental disorder and conduct that produces accidental injury.[125] Despite this acknowledgement, Shuman does not restrict his subjective test proposal to that small group whose mental disorders render them incapable of controlling their injurious conduct. Incredibly, Shuman concludes that to maximize the therapeutic potential of tort law, the subjective standard should be extended to the walking wounded.[126] Although Shuman correctly observes that stress may affect our concentration and responsiveness, he does not prove that people under stress are incapable of adhering to the objective standard of the reasonable person. Although we may wish to encourage people under stress to obtain treatment, absent such proof we should be unwilling to reward them for getting treatment by using a subjective standard of care to measure their tort liability.

To narrow the target population qualifying for the subjective standard,

---

120. Morse II, *supra* note 119, at 362.

121. *Id.* at 366.

122. Morse I, *supra* note 119, at 576. Morse concluded: "Most people with mental disorders, even severe ones, are not different enough from normal persons to warrant special treatment, and there is little scientific reason to believe that they cannot control themselves." *Id.* at 653.

123. Morse II, *supra* note 119, at 369.

124. Morse I, *supra* note 119, at 571. Some recent research suggests that mental disorder may be related to violent behavior. The increased risk of violence, however, was found only among those mentally disordered persons who were currently experiencing psychotic symptoms. Bruce G. Link et al., *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 AM. SOC. REV. 275 (1992); Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 761 (1990). The elevated risk of violence for actively psychotic individuals has been characterized as "modest" and makes only a "trivial contribution" to the total violence in our society. Link, *supra*, at 290.

125. Shuman, *supra* note 43, at 413. In another article, Shuman noted that the relationship between the organic abnormality of epilepsy and automobile accidents is not as direct as might be thought. Although drivers with epilepsy have an increased risk of automobile accidents, studies show that only 11% of the accidents in which they are involved are attributable to seizures. The major cause of automobile accidents both for epileptics and the general population is driver error. Shuman, *supra* note 85, at 142 (discussing Allan Krumholz et al., *Driving and Epilepsy: A Review and Reappraisal*, 265 JAMA 622, 622 (1991)).

126. Shuman, *supra* note 43, at 414.

Shuman imposes treatment obligations. As formulated, however, those obligations generate more questions than answers. For example, Shuman would limit the subjective standard to those defendants who initiated treatment prior to their injury-producing conduct.[127] One may question whether this treatment requirement effectively narrows the target population. The recent massive study on the prevalence of mental disorder revealed that professional treatment was obtained by 42% of those who experienced a mental disorder during their lifetimes and 20.9% of those who experienced a mental disorder within the preceding twelve months.[128] Extrapolating these percentages to the entire population suggests that fifty million people would meet the treatment requirement during their lifetimes and fifteen million would do so within a twelve-month period. These large numbers reflecting the prevalence of treatment exist without any subjective tort standard inducement. How much larger will these numbers become if Shuman's proposal is adopted and achieves its therapeutic objective?

Additionally, would the initiation-of-treatment requirement be used inappropriately to exclude mentally disordered people who have been released from involuntary hospitalization on condition that they continue to take post-confinement medications? Should they be denied a subjective test because they did not volunteer for treatment originally? Perhaps compliance with the treatment regimen should be sufficient without an initiation-of-treatment requirement.

For the subjective standard to be applicable, Shuman requires full compliance with the treatment regime.[129] If a patient sometimes forgets to take his or her medication, as we all do on occasion, or if a patient infrequently cancels an appointment with a therapist, is he or she forever branded with an objective standard? If not, then how do we measure the requirement of full compliance? In answering that question, must we consider the significance of that missed medication or canceled appointment on the subsequent accident-producing behavior or is noncompliance with treatment determinative without reference to its causative effect?

Shuman also wrestles with the problem of treatment unavailability.[130] Apparently, he would extend the subjective standard to indigent people who made a good faith effort to obtain treatment that is financially unavailable. He admits, however, that difficulty is likely to be encountered in documenting efforts to obtain treatment and to assess financial incapacity.[131] Should the subjective standard be extended to people living in rural areas for whom treatment is unavailable? How much inconvenience must one endure in making a good faith effort to obtain treatment? Most importantly, what if treatment is unavailable because the person's mental disorder is untreatable? Should that person be excluded because we can not use the tort law incentive

127. *Id.* at 426.
128. Kessler, *supra* note 112, at 14.
129. Shuman, *supra* note 43, at 426.
130. *Id.* at 427.
131. *Id.*

to encourage that person to obtain treatment that is nonexistent? If so, how can we justify a distinction between the untreatable and the indigent or the rural dweller?

Finally, Shuman limits use of the subjective standard to situations in which the defendant, prior to the injury-producing conduct, initiated a treatment that has "been proven effective through rigorous scientific studies."[132] Although Shuman's purpose is to eliminate fringe treatments from consideration, he provides no definition of efficacious treatment. In fact, earlier in his article, Shuman notes that although psychotherapy is considered to be effective for the treatment of nonpsychotic depression and moderate anxieties, no consensus exists about psychotherapy's efficacy for other mental or emotional problems.[133] Would he exclude even this mainstream psychiatric treatment unless the initiating patient suffered from depression or anxiety?

To prevent unwarranted use of the subjective standard by people with no mental problems, Shuman requires an evaluation by a mental health professional.[134] But such an evaluation is not likely to be an effective barrier. Mental health professionals are trained to make diagnoses. If a person initiates treatment, complaining of sleeplessness, anxiety, depression, or any other symptom, some diagnosis is likely to be made and some treatment prescribed. The diagnosis of unspecified mental disorder (nonpsychotic) is made when enough information has been provided to rule out a psychotic disorder but not enough information is available to make another diagnosis.[135]

In deciding what constitutes an effective treatment, should one consider the qualifications of the therapist? Should distinctions be drawn between various mental health professionals—for example, should therapy by social workers or marriage, family, and child counsellors serve to reduce the standard of care? Should a distinction be drawn between all mental health professionals and priests or other lay-counsellors? For example, if a person suffered depression because of the untimely death of a loved one, should that individual be denied the subjective standard for choosing to interact with a lay-support group rather than a psychologist? Should someone with a significant drinking problem be denied the subjective standard for regularly attending meetings of Alcoholics Anonymous instead of seeing a psychiatrist? What if a psychiatrist or psychologist recommended these lay-support groups at an initial diagnostic session? Have these treatments been proven effective through rigorous scientific studies?

The argument for a subjective standard is weakened by a requirement that treatment effectiveness be proven. If a particular treatment has undergone rigorous scientific studies, then in addition to knowing whether that treatment is effective, we should also know the limitations of and the dangers inherent in that treatment. For example, before prescribing psychotropic

132. *Id.*
133. *Id.* at 422.
134. *Id.* at 429.
135. AMERICAN PSYCHIATRIC ASS'N, *supra* note 2, at 687.

medication, the psychiatrist considers not only its potential effectiveness, but its potential side effects such as drowsiness or decreased cognitive function. If the psychiatrist knows that the patient will drive an automobile and then prescribes the medication without informing the patient of these risks, the psychiatrist can be held liable for injuries caused by these side effects. If the psychiatrist informs the patient of these potentially dangerous side effects and the patient with such knowledge decides to drive the automobile anyway, the patient should be held liable for injuries that are produced by the side effects. The patient's duty to exercise reasonable care should not be diminished.

III. TOWARD A REASONABLE SOLUTION

Shuman's attempt to encourage mental health treatment is likely to be endorsed by mental health professionals. After all, it offers them full employment. Almost everyone would benefit from treatment for the stress of everyday living. If a person seeks treatment, under Shuman's proposal he or she is eligible for the subjective standard of care.[136] The proposal is far too expansive to be acceptable. Other, more narrowly crafted, proposals that apply the subjective standard to people with diagnosable mental disorders should also be rejected.[137] Injurious behavior has not been proven to be uncontrollably caused by mental disorder.[138]

But should an objective test be used in each and every case? I think not.

In *The Common Law*, Holmes defended the objective, reasonable person standard.[139] In an often-quoted passage,[140] Holmes asserted that by sacrificing consideration of individual peculiarities and minute differences of character,[141] the objective standard assures that innocent plaintiffs will be protected against a socially unacceptable level of risky behavior. Holmes cautioned, however, that use of the objective standard assumes that potential defendants possess ordinary capacity to avoid harm. Thus, "[w]hen a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them."[142] As examples, Holmes mentioned physically challenged individuals and children. Holmes then noted:

> Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the

136. *See supra* notes 108-31 and accompanying text.

137. *See* Curran, *supra* note 8, at 74 (discussing whether a subjective test should apply to people with personality disorders).

138. *See supra* notes 119-24 and accompanying text.

139. HOLMES, *supra* note 1, at 108-09.

140. KEETON, *supra* note 5, at 176. Shuman quotes Holmes's statement in full. Shuman, *supra* note 43, at 418.

141. HOLMES, *supra* note 1, at 108.

142. *Id.* at 109.

> sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.[143]

With increased understanding of mental disorder, Holmes's solution may be even more appropriate today than when he first suggested it over a hundred years ago. Even Morse, who asserted that mentally disordered people generally are capable of behaving rationally,[144] acknowledged that "[t]he law should interfere and nullify the usual legal significance of a person's actions . . . if it is satisfied that the individual was incapable, for whatever reason, of meeting the functional criteria for competence and full legal responsibility."[145] As an example of incapacity, Morse cited a chronically disabled, hallucinating, delusional person wandering the streets in rags and speaking gibberish.[146] Tort cases involving such people occur infrequently, but when they do occur, they should be handled appropriately.

In 1970, the Wisconsin Supreme Court refused to apply the objective standard to every case involving a severely mentally disordered defendant. In *Breunig v. American Family Ins. Co.*,[147] the court held that if a defendant is suddenly overcome without forewarning by a mental disorder that prevents conformance to the reasonable person standard, the defendant will be absolved from liability as if he or she had suffered a sudden incapacitating physical injury such as an unexpected heart attack, epileptic seizure, stroke, or fainting spell.[148] In essence, the defendant is relieved from liability because the sudden, incapacitating mental disorder is treated as an unavoidable accident.

The *Breunig* court's willingness to absolve incapacitated mentally disordered defendants from tort liability is commendable. However, the court's attempt to distinguish sudden mental disorder from other mental disorder has been strongly criticized.[149] Although sudden incapacitation seems an appropriate requirement for cases involving physical disabilities, it is inappropriate for cases involving mental disabilities. Severely mentally disordered individuals may be unable to control their behavior even though their disorder was not of sudden onset. In such cases, fault cannot be found. To paraphrase Holmes, if severe mental disorder has manifestly incapacitated a defendant from complying with the reasonable person standard, the injury was produced by an unavoidable accident, and the defendant should be absolved from responsibility.

---

143. *Id.*

144. *See supra* notes 119-24 and accompanying text.

145. Morse I, *supra* note 119, at 649. *See also* Ellis, *supra* note 8, at 1089: "But among those cases in which causation is established, it is likely that the law would demand (as it does in the criminal field) that the disability involved be of sufficient magnitude or of a particular type to warrant exoneration from responsibility for torts."

146. Morse II, *supra* note 119, at 370.

147. 173 N.W.2d 619 (Wis. 1970).

148. *Id.* at 624. In *Breunig*, however, the court affirmed a finding of liability, noting that the evidence was sufficient to permit the jury to find that the driver of an automobile had sufficient warning or knowledge that hallucinations would occur and affect her driving. *Id.* at 625.

149. *See, e.g.*, Ellis, *supra* note 8, at 1101-02.

Acceptance of Holmes's modest proposal will have little immediate impact on tort liability of mentally disordered persons. Most will continue to be judged by the objective reasonable person standard. But in those few cases in which the disorder manifestly incapacitates the defendant from complying with that standard, liability for negligence will not be imposed.[150] Attempts to broaden this narrow principle of nonliability should be resisted absent proof that the person's mental disorder was casually linked to the tortious behavior.

150. For intentional tort liability to be imposed on a mentally disordered defendant, the defendant must act with an intent to bring about tortious consequences. "Intent" requires that the defendant desires the consequences or knows that the consequences are substantially certain to result from his or her act. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965). This requirement provides protection against liability without fault in an intentional tort context.